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No. 99-830

In The

Supreme Court of the United States

DON STENBERG, Attorney General of the State of Nebraska, et al., *Petitioners*,

v.

LEROY CARHART, M.D., *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of Amici Curiae National Right to Life Committee, Christian Legal Society, Concerned Women for America, The Southern Center for Law and Ethics, and Focus on the Family in Support of Petitioners

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36pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Right to Decide to Terminate Pregnancy Does Not Include a Right to Secure a Partial-Birth Abortion. 5

A. *A Ban on Partial-Birth Abortion Does Not Implicate the Policy Considerations Underlying this Court's Decision in Planned Parenthood v. Casey.* 6

B. *The Right to Decide to Terminate a Pregnancy Does Not Encompass the Right to Production of a Dead Fetus* 10

C. *The Right to Decide to Terminate Pregnancy Does Not Encompass the Right to Determine the Method by Which Pregnancy Is Terminated.* 16

D. *In Balancing an Enhanced State Interest in Protection of the Unborn Child in the Process of Birth Against a Diminished Interest in Pregnancy Termination, Nebraska's Partial-Birth Abortion Ban Does Not Unduly Burden Any Abortion Liberty* 18

III. The Nebraska Partial-Birth Abortion Ban Does Not Impose an Undue Burden on

the Right to Decide to Terminate a Pregnancy. 21

A. *Nebraska's Ban Survives Facial Attack Under Both the* Salerno *"No Set of Circumstances" Rule and the* Casey *"Large Fraction" Rule* 22

B. *The Absence of a Generalized Exception Permitting Partial-Birth Abortion for Maternal Health Does Not Unduly Burden the Right to Decide to Terminate Pregnancy* 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Carhart v. Stenberg, 11 F. Supp. 2d 1099 (D. Neb. 1998) 7, 27

Colautti v. Franklin, 439 U.S. 379 (1979) 29

Maher v. Roe, 432 U.S. 464 (1977) 26

Planned Parenthood of S.E. Pennsylvania v. Casey, 744 F. Supp. 1323 (E.D. Pa. 1990) 8, 19

Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833 (1992) ..... *passim*

Roe v. Wade, 410 U.S. 133 (1993) ..... *passim*

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 6

United States v. Salerno, 481 U.S. 739 (1987) 16, 18

STATUTES

720 Ill. Comp. Stat. 513/5-5, 513/5-10, 513/5-20 (West 1998) 9

Ala. Code §§ 26-23-1, 26-23-3 to 26-23-4 (1998) 9

Alaska Stat. §§ 18.16.050 (Michie 1998) 9

Ariz. Rev Stat. Ann. 13.3603.01 (West 1997) 9

Ark. Code Ann. §§ 5-61-201 to 5-61-203 (Michie 1997) .. 9

Fla. Stat. Ann. §§ 390.11, 390.0111 (West 1998) 9

Ga. Code Ann. § 16-12-144 (1998) 9

Idaho Code § 18-613 (1998) 9

Ind. Code Ann. §§ 16-18-2-267.5, 16-34-2-1(b), 16-34-2-7(d) (Michie 1998) 9

Iowa Code § 707.8A (1998) 9

Ky. Rev. Stat. §§ 311.595(3), 311.720, 311.990(11) (Michie 1998) 9

La. Rev. Stat. Ann. § 32.9 (West 1998) 9

Miss. Code Ann. §§ 411-41-71, 411-41-73 (1998) 9

Mo. Rev. Stat. § 565.300 9

Neb. Rev. Stat. §§ 28-326(9), -328(1)-(4) (Supp. 1998) . 11

N.J. Stat. Ann. §§ 2A:65A-5 to -7 (West 1997) 9

Ohio Rev. Code §§ 2919.15 to 2919.19, 2307.51, 2305.11(C) (1997) 9

Okla. Stat. tit. 21, § 684 (1998) 9

R.I. Gen. Laws §§ 23-4.12-1, 23-4.12-2, 23-4.12-3, 23-4.12-4 (1998) 9

S.C. Code Ann. §§ 44-41-85, 16-1-90(F) (Law Co-op 1997) 9

S.D. Codified Laws §§ 34-23A, 34-23A-32 (Michie 1998) 9

Tenn. Code Ann. § 39-15-209 (1997) 9

Utah Code Ann. § 76-7-310.5 (1999) 9

Va. Code Ann. § 18.2-74.2 (Michie 1998) 9

W.Va. Code §§ 33-42-3, 33-42-8 (1998) 9

Wis. Stat. §§ 895.038, 940.16 (1997) 9

RULES

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

INTEREST OF AMICI CURIAE[1]

The **National Right to Life Committee**, Inc. (NRLC) is a nonprofit organization whose purpose it to promote respect for the worth and dignity of all human life from conception to natural death. NRLC is comprised of a Board of Directors representing 51 state affiliate organizations and about 3,000 local chapters made up of individuals from every race, denomination, ethnic background, and political belief. It engages in various political, legislative, legal, and educational activities to protect and promote the concept of the sanctity of innocent human life.

The **Christian Legal Society**, founded in 1961, is a nonprofit interdenominational association of over 4,000 Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation. Further, the Society has a keen interest in promoting the sanctity of human life.

Concerned Women for America (CWA) was founded in 1979 by Beverly LaHaye to speak for women who believed that feminists did not speak for all women. Today, Concerned

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[1]**Rule 37.6**: Amici Curiae disclose that (1) no counsel for a party authored this brief in whole or in part and (2) no monetary contribution was made to the preparation or submission of this brief by any person or entity, other than the Amici Curiae, their members, or their counsel. **Rule 37.3(a)**: Petitioners and Respondent consented to the filing of this brief. Consent letters have been provided to the Clerk.

Women for America – with members in all 50 states – is the largest public policy women's organization in the Nation. Numbering over 500,000 nationally, CWA members are active at all levels of policymaking. Its membership includes women and men of all ages and from all walks of life and affiliation with multiple political parties. CWA promotes traditional values and strong families through education and legislation, focusing on six core issues. The sanctity of life is central to the work and mission of CWA.

The **Southern Center for Law and Ethics** is a non-profit, publicly funded, tax-exempt corporation founded in 1985 and based in Birmingham, Alabama. The Center furnishes legal counsel and files amicus curiae briefs on a variety of issues, including constitutional and reproductive issues. The Center has been particularly active, through litigation and scholarship, in seeking to develop and promote a proper understanding of the constitutional right of privacy/substantive due process. The Center submitted amicus curiae briefs in this Court in *Webster v. Reproductive Health Services* (1989), *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), and *Washington v. Glucksberg* (1997). The Center is particularly concerned with the treatment of partial-birth abortion within the context of the Court's developing privacy/substantive due process jurisprudence.

Focus on the Family is a California Nonprofit Religious Corporation committed to strengthening the family in the United States and abroad. The president of Focus on the Family, James C. Dobson, Ph.D., is a child psychologist who has written extensively on child rearing and family relations. Dr. Dobson hosts, and Focus on the Family distributes, a daily radio broadcast about family issues that reaches approximately 1.7 million listeners each day in the United States, Canada and around the world. Focus on the Family publishes and distributes

Focus on the Family magazine and other literature that is received by more than 2 million households each month. Focus on the Family has actively promoted the sanctity of human life and has appeared in numerous cases before this Court as *amicus curiae*. Focus on the Family actively promotes public policies which provide protection for infants, children and women and is specifically concerned about the trend in American life toward the acceptance of infanticide

SUMMARY OF THE ARGUMENT

The Nebraska partial-birth abortion statute, properly construed, bans only intentional killing of a fetus after intentionally delivering the body of the fetus, except for the fetal head, into the vagina for the purpose of killing the fetus. As such, the Nebraska ban does not directly implicate the abortion liberty recognized by the precedents of this Court.

The policy considerations that formed the basis for this Court's reaffirmance of the right to decide to terminate pregnancy do not apply to partial-birth abortion bans. These statutes prohibit killing the fetus while in the process of birth although alternative means of terminating pregnancy are available. Americans do not rely upon access to such a procedure to conduct their social or economic lives. Subjecting partial-birth bans to rigid scrutiny would signal a return to the abortion jurisprudence that preceded *Planned Parenthood v. Casey*. It would be contrary to the very considerations of stare decisis and concern for judicial integrity that *Casey* represented.

The *Roe/Casey* right does not include the right to production of a dead fetus or to determine the method of pregnancy termination. When means exist to safely terminate pregnancy without directly killing the fetus, the State might thus prohibit the killing act. Here, safe alternative means of pregnancy termination are available that do not involve feticide, so the

Nebraska statute does not place a substantial obstacle in the path of women seeking to terminate pregnancy.

The State's interest in protection of the fetus increases and the woman's interest in pregnancy termination diminishes as the fetus approaches birth as it leaves the maternal body. The new balance struck between these competing rights and interests in the context of partial-birth abortion warrants greater regulation by the State in furtherance of its interest in protection of fetal life.

To the extent that partial-birth abortion bans implicate the right to decide to terminate pregnancy, they nevertheless do not impose an undue burden on the exercise of this right. In this facial attack, the Nebraska statute survives under the standard of *United States v. Salerno* because there are obvious circumstances in which the statute has constitutional applications. The Nebraska ban likewise survives under the undue burden test announced by *Planned Parenthood v. Casey* because it does not form a substantial obstacle to large fraction of women for whom it is relevant. At most, 1/19th to 2/19ths of Respondent Carhart's patients could conceivably be blocked from deciding to secure abortion under the Nebraska ban.

A generalized exception that would permit performance of partial-birth abortion for maternal health reasons is not required. The Nebraska statute does not forbid pregnancy termination for any reason, but only the use of a certain method of pregnancy termination. Since safe alternative methods are available, women's health interests are not compromised by the Nebraska ban. Certainly, there is no significant maternal health advantage to performance of partial-birth abortion. This Court's precedents warrant state regulation to protect fetal life when, as here, there is no substantial threat to maternal health entailed.

ARGUMENT

I. The Right to Decide to Terminate Pregnancy Does Not Include a Right to Secure a Partial-Birth Abortion.

Properly construed, the Nebraska partial-birth abortion statute bans only intentional killing of a fetus after intentionally delivering the body of the fetus except for the fetal head into the vagina for the purpose of killing the fetus.[2] Amici argue that the feticidal conduct prohibited by the Nebraska ban does not directly implicate the abortion liberty recognized in *Roe v. Wade*, 410 U.S. 133 (1993), and modified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

As this Court has stressed, the liberty recognized by *Roe* and *Casey* is the woman's "freedom to decide whether to terminate her pregnancy." *Casey*, 505 U.S. at 874, quoting *Maher v. Roe*, 432 U.S. 464, 473-474 (1977). "Roe did not declare an unqualified 'constitutional right to abortion.'" *Id.* The woman's right is not "absolute and . . . she is [not] entitled to terminate her pregnancy at whatever time, in whatever way,

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[2]Amici adopt the construction of Neb. Rev. Stat. §§ 28-326(9), -328(1)-(4) (Supp. 1998), the Nebraska partial-birth abortion ban, of the Attorney General of the State of Nebraska, which requires: 1) intentional delivery of the body of the fetus except for the fetal head into the vagina for the purpose of killing the child, 2) killing the fetus with specific intent to do so after delivery into the vagina, and 3) completion of the delivery.

Under this construction, the fetus that presents head-first is never subject to the statute since it applies only to the fetus that has emerged from the uterus feet-first and whose head remains lodged in the uterus. Similarly, it does not apply to the conventional D&E procedure since the D&E involves dismemberment before the fetus might emerge feet-first from the uterus to a head-lodged position.

and for whatever reason she alone chooses." *Roe*, 410 U.S. at 153. Laws regulating pregnancy termination should be upheld "which in no real sense deprived the woman of the ultimate decision," *Casey*, 505 U.S. at 875, and "if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 877.

The Nebraska ban prohibits the use of a certain method of abortion; it does not forbid the woman to decide or to effectuate the decision to terminate pregnancy. Nebraska forbids intentional killing of the fetus in the process of pregnancy termination; it does not prohibit termination of the pregnancy. Moreover, none of the considerations that led this Court to affirm the central holding of *Roe* in *Casey* are present here: Upholding a ban on partial-birth abortion would not threaten jurisprudential disrepute or undercut social and personal assumptions based on recognition of right to decide to terminate pregnancy.

A. *A Ban on Partial-Birth Abortion Does Not Implicate the Policy Considerations Underlying this Court's Decision in Planned Parenthood v. Casey.*

Bans on partial-birth abortion, such as the Nebraska statute now before this Court, do not directly implicate the central holding of *Roe v. Wade*, reaffirmed in *Planned Parenthood v. Casey*, namely, a woman's right to decide whether to terminate a pregnancy.

Partial-birth abortion laws prohibit one type of abortion procedure, while allowing other safe procedures to be performed with impugnity. They forbid conduct directly intended to kill the fetus, although killing the fetus is unnecessary in order to achieve pregnancy termination. They involve killing a fetus near the completion of the process of pregnancy termination, where the fetal head is lodged in the uterus and the remainder of the fetal body is in the birth canal or outside the maternal body.

If the joint opinion in *Casey* is controlling, such limited regulation of abortion practice should simply not be subjected to the relentless scrutiny to which pre-*Casey* regulations were subjected even when they presented no substantial obstacle to effectuation of a decision to abort. *See* 505 U.S. at 875. The *stare decisis* considerations and concerns over the reputation of judiciary expressed in *Casey* militate against abandoning *Casey*'s more balanced, nuanced approach to abortion jurisprudence in favor of a return to the absolutist scrutiny that preceded *Casey* and urged by the Respondent here.

Under the Respondent's theories, the right to decide to terminate a pregnancy includes a right to production of a dead fetus. The abortion choice includes not only the right to terminate pregnancy, but the right to do so in any manner one chooses. In Respondent's view, the State's substantial and

profound interest in the protection of fetal life even in the process of birth must always yield to any asserted interest in maternal health, no matter how speculative and remote. Legislative determinations of fact must be discounted, argues Respondent, in favor of the mere discretionary judgments of individual physicians performing abortion.

This radical, ideologically driven approach is definitely at war with the moderating approach promised by *Casey*, which abandoned the rigid verities that attended the trimester system, including its complete devaluation of the State's interest in fetal life prior to viability. *See* 505 U.S. at 875-76.

Upholding partial-birth abortion bans would entail none of the serious issues of reliance that counseled against reversal of *Roe* in *Casey*. As the Court noted:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion . . . The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. [505 U.S. at 856.]

On the present facts, it cannot be seriously argued that "people have organized their thinking and living" (*id.*) around the availability of partial-birth abortion. To the contrary, it is a marginal and controversial procedure unnecessary to abortion practice. The balance *Casey* struck between competing interests at stake in abortion should not be sacrificed for the sake of a procedure that lies nowhere near the core considerations that prompted recognition of the abortion liberty or that argued against reversal of *Roe*.

Nearly three-fifths of the States have banned partial-birth abortion,[3] and Congress has twice voted to ban the procedure with two-thirds majorities in the House and near two-thirds majorities in the Senate. Cong. Rec. S18228, roll call #596 (Dec. 7, 1995); Cong. Rec. H2929, roll call #94 (Mar. 28, 1996); Cong. Rec. H3338-3339, H. Doc. 104-198 (Apr. 10, 1996). It cannot be assumed that the States and Congress would so proceed if women or the population as a whole relied on the availability of the procedure to any significant degree in pursuing their social and personal expectations. To the contrary, such

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[3]Twenty-seven states have enacted statutes substantially similar to Nebraska's: Ala. Code §§ 26-23-1, 26-23-3 to 26-23-4 (1998); Alaska Stat. §§ 18.16.050 (Michie 1998); Ariz. Rev Stat. Ann. 13.3603.01 (West 1997); Ark. Code Ann. §§ 5-61-201 to 5-61-203 (Michie 1997); Fla. Stat. Ann. §§ 390.11, 390.0111 (West 1998); Ga. Code Ann. § 16-12-144 (1998); Idaho Code § 18-613 (1998); 720 Ill. Comp. Stat. 513/5-5, 513/5-10, 513/5-20 (West 1998); Ind. Code Ann. §§ 16-18-2-267.5, 16-34-2-1(b), 16-34-2-7(d) (Michie 1998); Iowa Code § 707.8A (1998); Ky. Rev. Stat. §§ 311.595(3), 311.720, 311.990(11) (Michie 1998); La. Rev. Stat. Ann. § 32.9 (West 1998); Michigan Senate Bill 546, P.A. 107 (1999) (signed July 7, 1999) (eff. date 90 days after closing of 1999 legislative session); Miss. Code Ann. §§ 411-41-71, 411-41-73 (1998); Missouri Senate Substitute No. 3 for House Bills Nos. 427, 40, 196 and 404 (1999), to be codified at Mo. Rev. Stat. § 565.300 et seq.; Mont. Code Ann. § 50-20-401, as amended by 1999 Mont Laws 479; Neb. Rev. Stat. Ann. §§ 28-326, 28-328, 71-148(15) (Michie 1997); N.J. Stat. Ann. §§ 2A:65A-5 to -7 (West 1997); N.D. Cent. Code §§ 14-02.6-01 to 14-02.6-03; Okla. Stat. tit. 21, § 684 (1998); R.I. Gen. Laws §§ 23-4.12-1, 23-4.12-2, 23-4.12-3, 23-4.12-4 (1998); S.C. Code Ann. §§ 44-41-85, 16-1-90(F) (Law Co-op 1997); S.D. Codified Laws §§ 34-23A, 34-23A-32 (Michie 1998); Tenn. Code Ann. § 39-15-209 (1997); Va. Code Ann. § 18.2-74.2 (Michie 1998); Wis. Stat. §§ 895.038, 940.16 (1997); W.Va. Code §§ 33-42-3, 33-42-8 (1998). Three other states have attempted to target intact D&X in statutes using different language. *See* Kansas Stat. Ann. § 65-6721 (1998); Ohio Rev. Code §§ 2919.15 to 2919.19, 2307.51, 2305.11(C) (1997); Utah Code Ann. § 76-7-310.5 (1999).

super majorities support the proposition that Americans do not even regard the partial-birth procedure as within the realm of what they consider to be "abortion." They perceive it to fall outside the scope of the abortion choice recognized in *Roe* and reaffirmed in *Casey*.

This Court cannot treat partial-birth abortion bans as though they jeopardized the abortion liberty to the same degree as actual prohibitions on the performance of any abortion. To do so would effectively label *Casey* as an aberration in abortion jurisprudence rather than its leading precedent. Such a retreat would be perceived as a "statement that [the] prior decision [in *Casey*] was wrong" and "would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term." 505 U.S. at 806. The Court's refusal to reverse *Roe* was based in significant part upon the concern that this "would subvert the Court's legitimacy beyond any serious question." *Id.* at 807. The Court's legitimacy would be likewise jeopardized should it now discard *Casey*'s more balanced approach in favor of a concept of the abortion liberty that embraces such extreme procedures as partial-birth abortion.

B. *The Right to Decide to Terminate a Pregnancy Does Not Encompass the Right to Production of a Dead Fetus.*

Respondent's claim that a ban on partial-birth abortion represents an undue burden on the abortion choice assumes that this liberty includes both the right to terminate the pregnancy of the woman and the right to kill the fetus. As the Respondent, Dr. Carhart, stated under cross-examination,

> My intent in every abortion that I have ever done is to kill the fetus and to terminate the pregnancy. It think that's the specific intent that I [have when I] enter the room when I go to talk to the patient. That's what she's asking to do, and that's what I'm there to do, and I do what I do to get that done.

J.A. 100.[4] Effectuation of Dr. Carhart's intent to terminate pregnancy is protected by *Roe* and *Casey*. Effectuation of his intent to kill the fetus is not.

Undoubtedly, fetal death is the likely outcome of most efficiently performed abortions, and there may be no other way to complete most abortions except in a manner that involves fetal death.

However, a guarantee of a right to "terminate pregnancy" – the right to empty the womb – does not of necessity include a right to feticide. The State maintains a "substantial" and "profound" interest in the protection of fetal life throughout gestation.[5] *Casey*, 505 U.S. at 876, 878. Plainly, the State may

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[4]References to the Supplemental Appendix to the Petition For Writ of Certiorari will noted ad "Supp. App. ___." References to the Joint Appendix will be noted as "J.A. ___."

regulate abortion practices to protect this interest, at least to the extent that the state action involved does not effectively prohibit the woman from safely securing an abortion. The State may proscribe killing the fetus if pregnancy termination may be safely accomplished without a killing act.

This distinction between a "right to terminate pregnancy" that is legitimate under this Court's decisions and an illegitimate "right to feticide" is at stake in evaluating the constitutionality of Nebraska's partial-birth abortion ban. As construed by the State, Nebraska's statute prohibits only direct, separate, and intentional feticidal conduct – typically, crushing the fetal skull or evacuating the fetal brain – after the fetus has been partially delivered to effectuate this purpose. The statute does not prohibit termination of pregnancy, but termination of fetal life. As such, it does not directly implicate the right to decide to terminate pregnancy recognized in *Roe* or *Casey*.

Nebraska has determined to assert its interest in protection of fetal life once the fetus has been caused to emerge from the uterus to the degree that only the fetal head remains within. The decision was made that, under these circumstances, the process

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[5]Amici note that the Nebraska statute's prohibition of a feticidal act applies without regard to whether the fetus is deemed "viable" – capable of survival outside the maternal body. Pregnancy termination of a nonviable child will necessarily result in death. However, the conduct that the Nebraska statute proscribes is a separate and intervening intentional killing act during the course of pregnancy termination, not pregnancy termination itself, even if it must necessarily lead to death.

The Nebraska statute is rationally related to the State's interest in protection of fetal life regardless whether the fetus is deemed viable. A nonviable fetus is terminally ill if pregnancy is terminated. But the State has an interest in protecting against intentional killing acts directed toward human beings – adult, child, or fetus – whether they are terminally ill or not.

of birth has so far progressed that feticidal conduct is no longer warranted or necessary to effectuate any legitimate interest in pregnancy termination. Pregnancy may continue to be terminated and the child delivered. But any killing act in the interim is proscribed.

Because the *Roe*/*Casey* right does not include a right to feticide, the Respondent can impugn the constitutionality of the Nebraska ban if and only if it somehow operates to effectively block a woman's decision to terminate pregnancy – to rid her body of the fetus. But the record of this case is devoid of any proof that a killing act – for example, collapsing of the skull or brain evacuation – is in any sense necessary to effectuation of a decision to terminate pregnancy once the fetus has been delivered to the extent that only the fetal head remains lodged in the uterus.

The Respondent testifies that, in the interests of efficiency and maternal health, he always attempts to deliver the fetus intact during the course of the post-first trimester abortions he performs. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998) (Supp. App. 15).[6] Either by design or accident,

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[6]As Dr. Martin Haskell, initiator of the partial-birth abortion procedure stated,

> I could put dilapan in for four or five days and say I'm doing a D&E procedure and the fetus could just fall out. But that's not really the point. The point here is you're attempting to do an abortion. And that's the goal of your work, is to complete an abortion. Not to see how do I manipulate the situation so that I get a live birth instead.

The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the Senate Comm. on the Judiciary, 104th Cong. (Nov. 17, 1995) at 22-24 (Letter from Barbara Bolsen, Editor of *American Medical News*, to the Hon. Charles T. Canady, Chairman, Subcomm. on the Constitution, Comm. on

(continued...)

however, the fetal head sometimes becomes lodged in the uterus as the rest of the fetal body emerges into the birth canal during the course of some abortions.

The Nebraska statute does not punish a killing act if the head should lodge by accident. Rather, the statute provides that the fetus must intentionally be delivered into this position for the purpose of killing for liability to attach. The Respondent can only be held liable if he purposely delivered the fetus into such a position for the sake of killing. This cannot in any way be necessary to effectuate a mere decision to terminate pregnancy.

Nothing in the record demonstrates that intentional delivery of a fetus into a head-lodged, footling breech position for the purpose of then killing the fetus in any way serves maternal health interests. The record suggests only that delivery of the fetus intact might have some advantage to maternal health. *Stenberg*, 11 F. Supp. 2d at 1107 (Supp. App. 20). But delivery of the fetus intact does not necessarily entail killing the fetus by collapsing the fetal skull or extracting the fetal brain. Nothing in the record suggests that it would be impossible to mechanically or chemically dilate the cervix further so that the fetal head might emerge or be delivered without crushing or evacuation, thereby completing pregnancy termination without resort to a feticidal act.[7] Even when the fetus has hydrocephalus, the size

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[6](...continued)
the Judiciary) (July 11, 1995) (attaching transcript of interview with Dr. Haskell from which quotation was taken)).

[7]*See* Combined Memorandum of Respondents [on Petition for Writ of Certiorari], *Planned Parenthood v. Wisconsin*, Nos. 99-1156 and 99-1177, 23a (¶ 132 of Amended Stipulation of Facts) (cervical relaxants can be used to free lodged head of partially-born child); J.A. 60 (Dr. Carhart: "I'm sure you could use more dilation, and you could remove them all (continued...)

of the fetal head can be reduced by cephalocentesis and the skull gently decompressed so that the fetus might be delivered without crushing the skull or evacuating the brain.[8]

Performance of the D&X or D&E abortion always entails purposeful dilation of the maternal cervix. At most, the record suggests only that further dilation of the cervix in order to deliver the fetal head without crushing or evacuation may pose some indeterminate risk of future cervical incompetence to the woman. J.A. 49. A possible implication is that footling breech delivery of the fetus into a head-lodged position followed by brain extraction or skull crushing would represent some relative health advantage to the woman.

However, the Respondent himself testifies about the dangers posed by potential fetal bone fragments to the woman. J.A. 47. Crushing the skull entails just such risks. He testified that the presence of fetal blood and especially brain tissue in the uterus presents the serious risks to the woman if these tissues should be absorbed into the woman's blood through the uterus. J.A. 47-50. Crushing the fetal skull would entail these risks.

Thus, whatever supposed health advantage is gained by delivering the fetus into the footling breech, head-lodged position for the purpose of killing the fetus without sufficient dilation to deliver the fetal head is balanced by the risks entailed

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[7](...continued)
intact if that were your goal.").

[8]Dr. Boehm also testified that where a fetus has severe hydrocephaly, causing the head to be too large to pass through the cervix, an ultrasound cephalocentesis procedure could be used to "drain the ventricles of the amniotic fluid to allow the head to slip through the cervix." J.A. 700-03. Dr. Boehm specifically testified that "We don't try to aspirate intra-cranial cerebral matter or brain matter." J.A. 702-03.

in performing the procedures necessary to kill the fetus. Certainly, the Nebraska legislature might conclude, in view of the balance of risks and Nebraska's profound and substantial interest in protection of fetal life, that forbidding a killing act when the fetal head is intentionally lodged in the uterus represents no *substantial* obstacle to effectively terminating a pregnancy.

Because the *Roe/Casey* right embraces only effectuation of decisions to terminate pregnancy, it protects only feticidal acts necessary to terminate pregnancy. The claim that crushing or evacuating the skull of a fetus purposely delivered into a head-only position in the uterus falls in any direct or meaningful way under the mantle of constitutional protection would stretch abortion jurisprudence well beyond the more reasonable boundaries that *Casey* insisted should apply. "The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Casey*, 505 U.S. at 876. Unless this Court is prepared to embrace a concept of the abortion liberty that includes a right to feticide, it should deem a prohibition on partial-birth abortion beyond the purview of right secured in *Roe* and *Casey*.

C. *The Right to Decide to Terminate Pregnancy Does Not Encompass the Right to Determine the Method by Which Pregnancy Is Terminated.*

The Nebraska partial-birth abortion statute does not prohibit pregnancy termination; it prohibits only use of a method of abortion that involves killing a child in the process of birth. The Nebraska statute could only effectively prohibit pregnancy termination if killing the fetus were necessary to safely perform pregnancy terminations in which the fetal head remains purposely lodged in the uterus while the rest of the fetal body is in the birth canal or if other alternative procedures were not

available. As Amici have shown, killing the fetus delivered in a head-lodged, breach position is neither necessary nor desirable. Moreover, it is uncontroverted that other safe, alternative methods of abortion are available – induction and conventional D&E procedures. Under no circumstance does the Nebraska statute represent an absolute obstacle to any pregnancy termination.

Any claim that the statute represents any obstacle at all is necessarily based on the notion that the D&X is always or sometimes safer than the D&E or induction procedures. Petitioners convincingly demonstrate that there is no competent, much less compelling, evidence that this is the case.

In this regard, the present case is easily distinguishable from the holding in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75-79 (1976), in which this Court held a prohibition on the use of saline amniocentesis abortion unconstitutional because safe, alternative abortion procedures were not readily available. Here, equally safe conventional D&E and induction procedures are available, and, where there is a breech presentation of the fetus, the fetus may be delivered without the killing act that the Nebraska statute proscribes.

The self-serving nature of the Respondent's claim that the D&X is necessary for maternal safety is exposed by the fact that the Respondent does not himself perform the D&X procedure except by default.

> Carhart does not intentionally convert the fetus to a footling breech; that is, he takes the fetus as he finds it. If the fetus presents feet first, Carhart will do a D&X. If, on the other hand, the fetus dues not present feet first, Carhart will do a D&E.

Stenberg, 11 F. Supp. 2d at 1121 (Supp. App. 59). Dr. Carhart might convert the fetus to a footling breech if the fetus lies in a

traverse or side-ways presentation, although he does not testify that he is more or less likely to convert the fetus to a feet-first or head-first position. J.A. 100. Yet if Dr. Carhart truly believed that the intact D&X procedure served maternal health interests, then he would attempt to manipulate the fetus into a footling breech position in every instance in which the fetus presents head-first or side-ways. (Indeed, if the trial court's finding that D&X is safer than D&E is to be believed, then it would be malpractice to fail to attempt to manipulate the fetus to a footling breech.) Obviously, it would make no constitutional sense to strike down the Nebraska statute because it precludes Dr. Carhart from using D&X as the safest procedure when Dr. Carhart does not himself use an intact D&X procedure except when convenient.

Respondent's argument against the Nebraska statute amounts to the erroneous assertion that the Constitution authorizes him to perform abortion in any manner he chooses so long as he can summon up some asserted maternal health benefit in doing so, no matter how speculative or pretextual. In the face of a legislative determination that equally safe alternative procedures are available, such a rule would eviscerate the conclusion of this Court that not all regulation of abortion should be deemed unwarranted. *Casey*, 505 U.S. at 876.

D. *In Balancing an Enhanced State Interest in Protection of the Unborn Child in the Process of Birth Against a Diminished Interest in Pregnancy Termination, Nebraska's Partial-Birth Abortion Ban Does Not Unduly Burden Any Abortion Liberty.*

In *Casey*, this Court abandoned the trimester scheme it had adopted in *Roe* because it "undervalue[d] the State's interest in the potential life within the woman. . . . The very notion that the State has a substantial interest in potential life leads to the

conclusion that not all regulations must be deemed unwarranted." 505 U.S. at 875-76. Thus, the Court held that abortion regulations should not be subject to "strict scrutiny" at any time of pregnancy, but instead should be found to improperly interfere with the abortion liberty only if they "unduly burden" the decision to seek abortion. *Id.* at 876-77. A state regulation is unduly burdensome and, thus, unconstitutional only if it "has the purpose or effect of placing a substantial obstacle [to] seeking an abortion . . . ." *Id.* at 887. Moreover, a regulation must "operate as a substantial obstacle to a woman's choice to undergo an abortion" in at least a "large fraction of the cases in which [the regulation] is relevant" in order to constitute an undue burden. *Id.* at 895.

A law that proscribes intentional killing of partially born children should not implicate the abortion right at all. But even if a diminished abortion liberty is tangentially implicated by Nebraska's statute, the statute does not create a substantial obstacle to the exercise of any supposed right to terminate pregnancy.

First, the Nebraska statute does not prohibit termination of pregnancy, but prohibits killing the child who is in the process of delivery and potential live birth. Even if the prohibition affects the manner in which pregnancy might be legally terminated, its impact on the abortion liberty is neither direct nor absolute, but indirect and incidental. Since pregnancy has already been at least substantially terminated before the Nebraska statute's prohibition can apply because the child has been delivered into the birth canal, the force of any abortion liberty asserted is dissipated.

Put another way, the strength of any claim to a right to terminate a pregnancy logically diminishes as a living child proceeds from the body of the mother. As the *Casey* Court observed, "in fairness," "a woman who fails to act before [fetal] viability has consented to the State's intervention on behalf of

the developing child." 505 U.S. at 870. Similarly, the woman who fails to act before the emergence of the fetus from her body has likewise consented to the State's intervention on behalf of the emerging child.

Second, the already substantial interest that the State maintains in the fetus increases as the child emerges from the body of the mother, as the child approaches the unquestioned status of a legal person under the law upon completion of live birth.

The Nebraska statute applies as the asserted abortion liberty wanes and as the State's interest in protection of the child in the process of birth waxes. Thus, in the relevant context of a partial-birth abortion, the enhanced state interest in protection of the child outweighs in the balance any diminished abortion liberty at stake in the procedure. From this perspective, any burden that the Act places on the abortion choice is neither substantial nor "undue," but represents legitimate state action in furtherance of a growing state interest in the protection of children as they proceed toward full legal personhood upon live birth.

III. The Nebraska Partial-Birth Abortion Ban Does Not Impose an Undue Burden on the Right to Decide to Terminate a Pregnancy.

Even assuming arguendo that the Nebraska partial-birth abortion ban genuinely implicates the right to decide to terminate pregnancy, it is constitutional unless it imposes an "undue burden" on the central right recognized in *Roe v. Wade*. *Casey*, 505 U.S. at 878. "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before viability." *Id.*

The purpose of the Nebraska statute is to proscribe unnecessary killing of a child in the process of birth, not to prevent a woman from effectuating a decision to terminate pregnancy. The effect of the statute is to compel the use of alternative techniques to the D&X, not to block the decision to abort. It can be understood to substantially burden a decision to terminate pregnancy only if it compels women to choose relatively unsafe abortion methods as the price of choosing abortion at all.

As Amici and the Petitioners have shown, however, there is no clear evidence that performance of the D&X procedure safer than other available techniques. Even if arguendo there were individual cases in which the D&X represents a significant maternal health advantage, this would warrant only declaring the Nebraska statute unconstitutional as applied to such circumstance. It would not warrant striking down the statute on the basis of a facial attack or as applied to all circumstances to which it applies.

A. *Nebraska's Ban Survives Facial Attack Under Both the* Salerno *"No Set of Circumstances" Rule and the* Casey *"Large Fraction" Rule.*

Although Respondent brought a facial attack against the Nebraska statute, the trial court declined to rule on this basis, holding instead that the statute was unconstitutional as applied to Dr. Carhart and his patients (and similarly situated persons).[9] *Stenberg*, 11 F. Supp. 2d at 1119-21 (Supp. App. 53-57). There seems no meaningful distinction between the trial court's "as applied" declaration of unconstitutionality and a facial declaration, however, since the trial court appears to hold that there is no circumstance in which the Nebraska statute may have a constitutional application. The Court of Appeals held the Nebraska statute facially unconstitutional on vagueness grounds.

When the Nebraska statute is properly construed and thereby not void for vagueness, it would be facially unconstitutional under *United States v. Salerno*, 481 U.S. 739, 745 (1987), only if there is "no set of circumstances" in which it might have a constitutional application. Under this standard, the Respondent cannot succeed because the statute plainly has some constitutional applications, e.g., in proscribing D&X abortions performed on viable fetuses where there is no health advantage or other indication for doing so.

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[9]Because the Respondent did not bring a class action, the trial court presumably reached persons "similarly situated" to Dr. Carhart's patients on the basis of Dr. Carhart's third-party representation of prospective patients. On the basis of this theory, however, relief should not have been granted to all persons similarly situated to Dr. Carhart's patients, but only to Dr. Carhart's present and future patients seeking abortion. Otherwise, the trial court's grant of relief amounts to a holding that the Nebraska statute is facially unconstitutional since it would apply to any person seeking D&X abortion.

Whether the *Salerno* standard continues to apply to abortion litigation is a matter of some dispute on this Court and among the Courts of Appeals. However, even if the *Salerno* standard is replaced with the "undue burden" test applied by this Court in *Casey*, the Nebraska partial-birth abortion ban passes scrutiny.

In determining whether a spousal notice to abortion law facially created an undue burden on the decision to abort, this Court held that outcome depended on whether the law represented a substantial obstacle to a choice for abortion for a "large fraction" of women for whom the law is relevant. *Casey*, 505 U.S. at 895. In the context of a spousal notice provision, the relevant class for whom the law was relevant included "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Id.* Because this Court held that a large fraction of women in this class would be effectively precluded from choosing abortion by the spousal notice requirement, it was deemed an undue burden.

By analogy, the controlling class in the present case is that of women seeking partial-birth abortions unnecessary to save their lives. Is a "large fraction" of this class effectively precluded from securing abortion as the result of the Nebrasaka ban? Clearly, no member of this class is actually precluded from securing abortion so long as alternative procedures remain available, as they are. At most, members of this class might claim that they are precluded from choosing the safest or most convenient abortion technique, not from choosing abortion at all.

Petitioners have demonstrated that there is no competent evidence sufficient to override the legislative determination that D&E and inductions procedures are as safe as intact D&X. Certainly, the record does not demonstrate that any health

advantage of the intact D&X is sufficient to constitute a *substantial* obstacle to the performance of any abortion for a *large fraction* of women seeking partial-birth abortions.

The insubstantial impact that the Nebraska statute has on effectuation of decisions to terminate pregnancy is illustrated by Dr. Carhart's own practice. Dr. Carhart will only attempt to perform D&X on members of the class of his patients seeking abortion when the fetus presents in a footling breech position. *Stenberg*, 11 F. Supp. 2d at 1121 (Supp. App. 58-59). Otherwise, he will perform a D&E. *Id.* Dr. Carhart performs the D&X between the 16th and 20th weeks of pregnancy,[10] and he is able to perform 10 to 20 D&X abortions of the approximately 190 abortions per year he performs during this time period. *Id.*

Thus, the Nebraska ban potentially affects only between 1/19th and 2/19ths of his abortion practice – hardly a "large fraction" of women seeking abortion from him. The impact of the Nebraska statute could be even further minimized by delivery of the fetus that presents footling breech without the separate killing act that the statute requires for liability. That is, the woman's cervix might be mechanically or chemically dilated so that the fetal head does not lodge in the uterus or the fetal head might be reduced in size through cephalocentesis if the fetus has hydrocephalus. *See* this Brief at 13-15.[11]

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[10]After 20 weeks, Dr. Carhart usually induces fetal death prior to performance of any procedure. *Stenberg*, 11 F. Supp. 2d at 1121-22 (Supp. app. 59-60). Because the fetus is not living upon partial delivery, the Nebraska partial-birth ban would have no application in such cases.

[11]Since the Nebraska statute requires that a living fetus be killed, liability under the statute can also be avoided by initially cutting the umbilical cord of the fetus in a footling breech position, thereby causing the death of the fetus before partial vaginal delivery of the fetus, as Dr. Carhart (continued...)

Respondent's facial attack on the statute should thus not succeed under either the *Salerno* standard or *Casey*'s undue burden/large fraction rule. To strike the statute because there may be some particular circumstance in which D&X may have some health advantage over induction or D&E would turn the *Salerno* standard on its head. The *Salerno* standard provides that a law may not be held facially unconstitutional unless it there are no circumstances in which it has a valid application. The standard suggested by Respondent's claim against the Nebraska statute would hold it unconstitutional if there is any circumstance in which it has an invalid application.

If there is some circumstance in which the Nebraska statute may indeed be unconstitutional in its application – some situation in which the partially born fetus must be killed to avoid an appreciable health risk to the woman – then the proper remedy is for the Respondent to seek a declaration that the statute is unconstitutional *as applied to that circumstance*. Generalized claims concerning the supposed health advantages of the D&X procedure are not sufficient to strike the Nebraska statute in its entirely and in all its applications.

B. *The Absence of a Generalized Exception Permitting Partial-Birth Abortion for Maternal Health Does Not Unduly Burden the Right to Decide to Terminate Pregnancy.*

The claim that any asserted maternal health interest at stake in pregnancy termination always overrides any interest that the State might assert in the protection of fetal life lies at the heart of the Respondent's case. "A select panel convened by [the American Academy of Obstetrics and Gynecology] could

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[11](...continued)
states he does in most instances. J.A. 56-57.

identify no circumstances under which this [D&X] procedure . . . would be the only option to save the life or preserve the health of the woman." J.A. 600. Nevertheless, Respondent argues that any asserted maternal health advantage, no matter how conjectural or speculative, justifies performance of the D&X procedure in preference to alternative procedures as a matter of constitutional law.

The Nebraska statute contains no exception to its prohibition on partial-birth abortion for instances in which partial-birth abortion is claimed to be necessary for maternal health. This does not, however, contradict the holding of this Court that abortion must always be available for "pregnancies that endanger life or health." *Casey*, 505 U.S. at 846.

The Nebraska statute does not prohibit termination of any pregnancy that threatens maternal health. It forbids only the killing of a child in the birth canal with specific intent to do so. Moreover, it allows for the use of alternative pregnancy termination techniques, thereby assuring that abortion will always be available for pregnancies that endanger health.

The Respondent would stretch the *Casey* requirement for a "health" exception to a *ban* on abortion to encompass the principle that the "safest" *type* of abortion should always be accessible, basing his claim on older decisions of this Court which appeared to hold that maternal health must always trump any interest in fetal life in regulating the manner in which abortion is performed. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 768-69 (1986); *Colautti v. Franklin*, 439 U.S. 379, 400 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 78-79 (1976).

But *Casey* reversed the Court's previous decisions in *Thornburgh*, *Colautti*, and *Franklin* insofar as they completely

discounted any interest in protection of pre-viable fetal life in favor of maternal health. As *Casey* held, the "basic flaw" in *Roe* and its progeny had been that they "undervalue[] the State's interest in the potential life within the woman." 505 U.S. at 875. The Court proceeded to hold that the State has a "substantial interest" in fetal life throughout pregnancy and that "[t]he very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted." *Id.* at 876. Thus, the State is permitted to enact measures "which favor childbirth over abortion, even if those measures do not further a [maternal] health interest." *Id.* at 886.

The informed consent/waiting period requirements upheld in *Casey* plainly involved sacrificing maternal health interests to the State's interest in the fetus. *See Casey*, 744 F. Supp. 1323, 1351 (E.D. Pa. 1990) (findings of fact). As the trial court in *Casey* found,

> The record . . . amply supports [a holding that the waiting period burdens the right to abortion]. However, I shall only briefly summarize my findings. Only a very small percentage of women are ambivalent concerning whether to have an abortion when they arrive at the facility. Once a woman gives her informed consent to the abortion procedure, there is absolutely no reason for delay. In fact, a mandatory 24-hour waiting period could, in reality, lead to delays in excess of 24 hours and perhaps as long as two weeks given the current practices of abortion providers and the individual circumstances of each patient. Any such delay presents an increased risk to the health of the patient. In some cases, the delay could force the woman into the second trimester of her pregnancy. This would increase the cost of the procedure, as well as the risk.
>
> Moreover, a mandatory 24-hour waiting period would require two visits to the abortion provider. This would

> double the woman's travel time, her exposure to the harassment of demonstrators located outside of most abortion facilities on a regular basis, and significantly increase her cost in obtaining the procedure. Further, women that work in the home and have children will have to expend additional sums for day care or baby sitting services, and women working outside the home will be required to take additional time off work. The economic impact of this provision will be most burdensome upon those women with the least financial resources, the poor and the young. Finally, women living in rural areas and those women that have difficulty explaining their whereabouts, such as school age women, battered women, and working women without sick leave, will also experience significant burdens in attempting to effectuate their abortion decision, if a mandatory 24-hour waiting period were in place.

Id. at 1379 (footnotes omitted). The Nebraska statute imposes no greater risks or burdens on maternal health interests for women seeking abortion than the significant risks and burdens imposed by the informed consent/waiting period requirements at issue in *Casey*.

The informed consent/waiting period requirements upheld by *Casey* applied even to abortions performed in early stages of pregnancy, while the Nebraska statute applies only to children in the process of birth when, as your Amici argue, the State has an enhanced interest in protecting the life of the child. If the waiting period/informed consent requirements that impose the sort of risks and burdens found by the district court in *Casey* ***may*** be sustained, then even greater risk and burdens may logically be permitted in furtherance of the State's interest in protecting children in the process of birth.

Similarly, this Court also upheld the medical emergency exception at issue in *Casey*, although it permits performance of an immediate abortion only to avert death "or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function." 505 U.S. at 880 (quoting Pa. Cons. Stat § 3203 (1990)). So long as "serious risk" includes any "significant threat" to the life or health of the woman, the medical emergency definition imposed no undue burden on the abortion liberty. *Casey*, 505 U.S. at 880. Again, maternal health interests were not deemed to defeat effectuation of contrary state interests in every case. Only if regulation represented some "significant" health threat to women choosing abortion would it be deemed unconstitutional.

In the present case, there is no convincing evidence that the woman must bear any health risk as the result of choosing available methods of abortion other than the D&X. But assuming arguendo there were some health advantage to D&X in some circumstance, there is no evidence that it is sufficiently significant to justify the conclusion that failure to include a generalized health exception in the Nebraska statute would represent an undue burden on a decision to terminate a pregnancy.

CONCLUSION

For the foregoing reasons, Amici Curiae request this Court to reverse the Eighth Circuit's decision and uphold Nebraska's partial-birth abortion ban.

Respectfully submitted,

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